Alamo Cement Company *and* United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL-CIO-CLC. Cases 23-CA-9458 and 23-CA-9599

9 December 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 31 August 1984 Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent herewith and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(5) and (1) on 26 June 1983 by changing the classification of Oscar Castillo from mix chemist to assistant chief chemist. We do not agree.[3]

The Board has held that in order for a unilateral change in a term or condition of employment to constitute a violation of Section 8(a)(5), it must be a material, substantial, and significant change.[4] In our opinion the change in Castillo's classification did not meet that standard.

Before the change, Castillo was classified as a mix chemist; however, his actual duties were as a physical tester in the laboratory. Even after the change in his classification, Castillo has spent most of his working time performing physical testing. Except for sporadic substitution for Chief Chemist Gonzales in Gonzales' absence, assistance to Gonzales with a monthly report, and a slight increase in his hourly wage, none of Castillo's terms and conditions of employment have changed. Thus, we find that in the circumstances of this case, the change in Castillo's classification does not constitute a material, substantial, and significant change in a term or condition of employment and, therefore, is not a violation of Section 8(a)(5) and (1).[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alamo Cement Company, San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

"(d) Unilaterally without notice to or consultation with the Union hiring new temporary employees at its Broadway operation, utilizing supervisors to operate its crusher at its Broadway operation, changing the bulk loader-weighmasters from hourly paid to salaried status, changing the manner in which overtime is paid to mechanics at its 1604 operation so that regular time is eliminated and only straight time is used, implementing an across-the-board pay increase whereby unit employees receive wage increases if their wage rates were at or below the wage rates for the classification of said employees, or otherwise changing the wage rates, hours, or other terms and conditions of employment of any bargaining unit employees, without first notifying the Union and providing it with an opportunity to bargain collectively with the Respondent in good faith concerning such proposed changes; provided that nothing herein shall require Respondent to rescind any wage increases or promotions which it has previously granted to all unit employees."

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F.2d 362 (3d Cir 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Because we agree with the judge that the enforcement of rule 8 against Lopez was unlawful, we find it unnecessary to pass on the judge's conclusion in fn. 5 of his decision that the General Counsel has failed to show that union animus motivated the Respondent to discipline Lopez.

[3] We do agree with the judge that the changed classification did not render Castillo a supervisor. In so concluding, however, we find it unnecessary to rely on *Union 76 Auto Truck Plaza*, 267 NLRB 754 (1983).

[4] *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978); *Peerless Food Products*, 236 NLRB 161 (1978); *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976).

[5] We also note that for some time in 1978-1979 Castillo was classified as an assistant chief chemist.

Member Dennis would adopt the judge's finding of a violation, noting particularly that the change in Castillo's classification occurred in the context of numerous other unilateral changes in employee terms and conditions of employment.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain, give effect to, or enforce any rule which prohibits employees from engaging in solicitation among coemployees on our plant premises during employees' nonworking time or prohibits employees from distributing literature on our plant premises on nonworktime and in nonwork areas.

WE WILL NOT suspend employees or otherwise discriminate against them because of their union membership, sympathies, or activities, or because they choose to engage in protected concerted activities for their mutual aid or protection.

WE WILL NOT refuse to recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL–CIO–CLC as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to furnish the above-named Union with relevant and necessary bargaining information concerning employees in the bargaining unit described below, including but not limited to the employees' names, addresses, phone numbers, wage classifications, and seniority.

WE WILL NOT unilaterally without notice to or consultation with the above-named Union hire new temporary employees at our Broadway operation, utilize supervisors to operate the crusher at our Broadway operation, change the method of paying bulk loader-weighmasters from hourly rates to salary, change the manner in which we pay the overtime to our mechanics at our 1604 operation whereby we eliminate regular time and utilize straight time, grant across-the-board pay increases to unit employees, or otherwise change the rates of pay, wages, hours or other terms and conditions of employment of any bargaining unit employees without first notifying the Union and providing it with an opportunity to bargain collectively with us in good faith concerning such proposed changes; provided, however, that we are not required to rescind any wage increases or promotions which we have previously granted to the unit employees.

WE WILL NOT refuse to bargain in good faith with the Union about the following changes and their effects: the hiring of a new temporary employee on or about May 9, 1983, as a laborer at our Broadway operation; our decision in June or July 1983 to resume operation of the crusher at our Broadway operation, utilizing Supervisors Sergio Zapata, Fred Contreras, and Sylvestre Ramirez; our decision in July 1983 to change our bulk loader-weighmasters at our Broadway operation from hourly to salaried status, or our unilateral decision in July 1983 to change the manner in which overtime was paid to mechanics at our 1604 operation whereby we eliminated regular time and used straight time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of all employees in the appropriate unit described below with respect to rates of pay, wages, hours, and terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement and on request furnish the Union with relevant and necessary bargaining information concerning the employees in the bargaining unit below, including, but not limited to, the employees' names, addresses, telephone numbers, wage classifications, and seniority. The bargaining unit is:

> All production and maintenance employees including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Power House Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truckdrivers and mechanics, but excluding all other employees including office clerical employees, order clerks, guards, watchmen and supervisors as defined in the Act, employed by us at our San Antonio, Texas plant.

WE WILL make restitution, with interest, for any loss of wages and benefits which the bargaining unit employees may have suffered because of the unilateral changes we have made in their conditions of employment.

WE WILL make employee Alfonso Lopez whole for any loss of wages he may have suffered as a result of the 30-day suspension imposed on him on 3 September 1983, and WE WILL expunge from our records and files any entry concerning his suspension.

WE WILL notify employee Alfonso Lopez, by letter, that we have expunged from his employment records any reference to the suspension we imposed on him on 3 September 1983, and not consider that suspension as basis for any future personnel action against him.

WE WILL, on request of the Union, rescind or bargain in good faith about each of the following unilateral changes: (1) the hiring of a new temporary employee about 19 May 1983, as a laborer at our Broadway plant; (2) the employment of Supervisors Sergio Zapata, Fred Contreras, and Sylvestre Ramirez to operate a crusher at our Broadway operations; (3) the changing of bulk loader-weighmaster classification from hourly pay to salary; (4) the change in the manner in which we paid overtime to the mechanics at our 1604 operations, whereby regular time has been eliminated and only straight time has been used.

ALAMO CEMENT COMPANY

Robert Levy, Esq.., for the General Counsel.
Michael Moore, Esq., and *Robert S. Bambace, Esq. (Fulbright & Jaworski)*, of Houston, Texas, for the Respondent.
Paul H. Balliet, of Waxahachie, Texas, and *Alfonso Lopez*, of San Antonio, Texas, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. Upon a charge filed by the Union, United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL–CIO–CLC, in Case 23–CA–9458, on September 19, 1983, against the Alamo Cement Company (formerly known as San Antonio Portland Cement Company),[1] the Regional Director for Region 23 issued a complaint on October 31, 1983, alleging that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. § 151 et seq.), by making unilateral changes in the wages and conditions of employment of its production and maintenance employees without bargaining collectively with the Union which was the exclusive collective-bargaining representative of those employees, by refusing the Union's request to bargain about the unilateral changes and their effects, and by refusing to furnish the Union with information alleged to be necessary and relevant to the Union's ability to perform its duties as the employees' exclusive collective-bargaining representative. The complaint also alleged that the Company violated Section 8(a)(1) and (3) of the Act by maintaining an excessively broad prohibition against solicitations and distribution and by suspending employee Al Lopez[2] for a period of 30 days because he violated that rule or because he engaged in union activity.

At the hearing, without objection by the Company, I granted the General Counsel's motion to consolidate further allegations based on a charge which the Union filed January 20, 1984, in Case 23–CA–9599, with the complaint in Case 23–CA–9458. As amended at the hearing, the consolidated complaint included three additional allegations of unilateral action by the Company which allegedly violated Section 8(a)(5) and (1) of the Act. In its answer, as amended, the Company denied commission of all the alleged unfair labor practices. On the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company is a Texas corporation with its principal office and place of business at San Antonio, Texas, where it processes and manufactures cement. The Company annually purchases and receives at its San Antonio plant products, goods, and materials valued in excess of $50,000 directly from locations outside the State of Texas. From the foregoing admitted commerce data, I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The consolidated complaint alleges, the Company's answers admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

1. Whether the Company violated Section 8(a)(5) and (1) of the Act by making unilateral changes in wages, hours, and other terms and conditions of employment without affording the Union prior notice and an opportunity to negotiate and bargain about those changes.

2. Whether the Company violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain collectively with the Union regarding the changes in wages, hours, and other terms and conditions of employment and their effects on bargaining unit employees.

3. Whether the Company by refusing to furnish the names, addresses, telephone numbers, wage classifications, and seniority for employees in the certified bargaining unit, violated Section 8(a)(5) and (1) of the Act.

4. Whether the Company violated Section 8(a)(1) of the Act by maintaining the following prohibition:

> Distributing literature or articles of any kind, including circulation of petitions. (Any advertising matter or propaganda or soliciting for any organization will not be permitted.)

[1] The name of the Respondent appears as corrected at the hearing
[2] The alleged discriminatee's full name on the record is Alfonso Lopez

5. Whether the Company violated Section 8(a)(3) and (1) of the Act by suspending employee Alfonso Lopez because he violated the above-quoted no-solicitation, no-distribution rule or because he engaged in union activity.

B. *The Alleged Violations of Section 8(a)(5) and (1) of the Act*

On March 5, 1979, the Board in *San Antonio Portland Cement Co.*, 240 NLRB 1168, 1170 (1979), found that the Company had violated Section 8(a)(5) and (1) of the Act since September 25, 1978, by refusing to bargain with the International Union component of the Union, designated as United Cement, Lime, Gypsum Workers International Union, AFL–CIO–CLC, as the certified bargaining representative of the following unit of its employees:

> All production and maintenance employees, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truck drivers, and mechanics, but excluding all other employees, including office clerical employees, order clerks, guards, watchmen, and supervisors as defined in the Act, employed by [the Company] at its San Antonio, Texas plant.

In the same decision, the Board found that the Company had also violated Section 8(a)(5) and (1) of the Act by failing to furnish bargaining information requested by the International Union. To remedy the Company's unlawful refusal to bargain with the International Union for the employees in the certified unit, the Board in *San Antonio Portland Cement Co.*, id., provided as follows:

> In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date [the Company] commences to bargain in good faith with the [International] Union as the recognized bargaining representative in the appropriate unit. [Citations omitted.]

The Board's Order was enforced in *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir. 1980), cert. denied 449 U.S. 844 (1980).

On May 21, 1980, Administrative Law Judge James T. Barker issued a decision in Board Cases 23–CA–7182, et al. (JD–(SF)–155–80), in which he found, inter alia, that following the Board-held election on March 17, 1978, in the unit described above, and during 1979, the Company's predecessor made unilateral changes regarding wages and conditions of employment without bargaining collectively with the International Union, and thereby violated Section 8(a)(5) and (1) of the Act. Judge Barker's decision is currently under Board review.

On July 15, 1983, I issued a decision in *Alamo Cement Co., d/b/a San Antonio Portlant Cement Co.*, in Case 23–CA–8880 (JD–279–83). In that case, I found that the Company had violated Section 8(a)(5) and (1) of the Act by unlawfully refusing to recognize and bargain with the International Union since July 27, 1981, and by making unilateral changes in wages, hours, and conditions of employment of the employees represented by the International Union in the certified unit. This decision is currently under Board review.

On October 27, 1983, Administrative Law Judge Richard J. Linton issued a decision in *Alamo Cement Co.*, Case 23–CA–9122, in which he found that the Company had made additional unilateral changes in the hours and conditions of employment of the bargaining unit employees without notice to or consultation with the International Union and thereby violated Section 8(a)(5) and (1) of the Act. Judge Linton's decision is also under Board review.

The parties have stipulated that on or about the dates noted below, the Company engaged in the following unilateral conduct, which I find affected the bargaining unit employees, without prior notice to or consultation with the Union, and without having afforded it any opportunity to negotiate and bargain: (a) About May 9, 1983, hired a new employee as a temporary laborer at its Broadway operations; (b) in June or July 1983, the exact date being presently unknown to the Regional Director, resumed operation of its crusher at its Broadway operations, utilizing Supervisors Sergio Zapata, Fred Contreras, and Sylvestre Ramirez, to operate said equipment; (c) commencing in July 1983, the exact date being presently unknown to the Regional Director, changed the compensation of bulk loader-weighmasters from hourly pay to salary; (d) commencing in July 1983, the exact date being presently unknown to the Regional Director, at its 1604 operations, changed the manner in which overtime was paid to mechanics, whereby regular time was eliminated and only straight time was used; (e) about October 4, 1983, at its Broadway operations, used its Supervisor Enrique Zapata to operate a crane; (f) about June 26, 1983, changed the classification of Oscar Castillo, from mix chemist (doing physical testing) in the laboratory department to assistant chief chemist in the laboratory department; (g) in January 1984, granted an across-the-board pay increase whereby employees received wage increases if their wage rates were at or below the wage rate for the classification of said employees; and (h) in January 1984, established a regular schedule whereby Supervisor Enrique Zapata was to operate a crane 8 hours each week. In addition to the foregoing stipulated facts, the parties have also stipulated the following facts as alleged in paragraphs 13, 14, 15, and 17, in the amended complaint. They are as follows:

> 13. At all times material herein, and more specifically since on or about July 15, 1983, the Union, by its agent Vice-President Paul H. Balliet, by correspondence to [the Company's] supervisor and agent William D. Hopper, protested the making of the unilateral changes and modifications as to mandatory and contractual terms of bargaining a described above in paragraph 11 and requested that [the Company] contact the Union in order to arrange suitable times and dates for the purposes of meeting, discuss-

ing and negotiating said unilateral changes and modifications and their effects on bargaining unit employees.

14. [The Company] has not acknowledged and/or replied to the Union's request as set out above in paragraph 13.

15. By letter dated August 1, 1983, the Union, by its agent Vice-President Paul H. Balliet, requested [the Company], by its supervisor and agent William D. Hopper, to furnish the names, addresses, phone numbers, wage classification and seniority for [the unit employees] for the purpose of collective bargaining.

. . . .

17. [The Company] has not acknowledged and/or replied to the Union's request as set out above in paragraph 15.

The Company contended that it did not violate Section 8(a)(5) and (1) of the Act by unilaterally promoting Oscar Castillo to assistant chief chemist on the ground that, by such change, Castillo became a supervisor thereby excusing the Company from its bargaining obligation. The General Counsel challenged this contention urging that Castillo's position as assistant chief chemist did not render him a supervisor within the meaning of Section 2(11) of the Act. If, as the Company urges, Assistant Chief Chemist Castillo is a supervisor as defined in Section 2(11) of the Act, the Company had no duty to bargain with the Union about his promotion. See *Gerber & Hurley, Inc.*, 269 NLRB 856, 858 (1984).

As defined in Section 2(11) of the Act, the term "supervisor" denotes:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This section is to be read in the disjunctive; possession of any one of the enumerated powers establishes supervisory status. *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 87 (6th Cir. 1964). The burden of establishing Castillo's supervisory status rested upon the Company. *Commercial Movers*, 240 NLRB 288, 290 (1979).

Prior to his July 1983 promotion, Castillo was classified as a mix chemist; however, his actual work was as a physical tester in the laboratory. Since his promotion, Castillo has spent most of his working time performing physical testing.

As assistant chief, Castillo aids his immediate supervisor, Chief Chemist Willy Gonzales, in the preparation of monthly laboratory reports and acts in Gonzales' place when he is absent from the laboratory. During Gonzales' 2-week vacation in 1983, on two or three additional weekends in 1983, and during Gonzales' occasional brief absences of 1 or 2 hours' duration, Castillo has acted as chief chemist of the laboratory. During such period, the laboratory employees looked to Castillo for advice on their work and considered him to be their "boss."

There was no showing that Castillo, whether acting in Gonzales' place or in his own right, has authority to hire, discharge, discipline, promote, or to recommend such personnel actions effectively. In Gonzales' absence, Castillo has directed employee Alfonso Lopez, who is a mix chemist, to run tests on cement. However, the record did not show whether Castillo issued such directions using his own judgment, or whether he was acting as a conduit for Willy Gonzales. On occasion, Castillo uses his judgment when he notes deficiencies in the cement in production and directs employees to take corrective measures. During Gonzales' absence, Costillo required employees to work overtime. Also, during Gonzales' absence, employees have telephoned Castillo at home during the latter's off-day hours for advice on laboratory problems. In Gonzales' absence, Castillo regularly signs pay authorization sheets for the laboratory chemists. However, no employees have ever asked Castillo for time off, nor was there any showing that he has authority to grant time off.

Unlike Chief Chemist Gonzales, who is salaried, Castillo continues to be hourly paid as are the unit employees. Castillo's hourly pay rate is $10.05. Mix chemist Alfonso Lopez' hourly pay is $9.65 and the regular hourly pay rate for mix chemists is $9.23.

Castillo has attended at least one supervisors' meeting. However, there is no showing that he regularly attended such gatherings.[3]

I find that the Company has not sustained its burden of proving that Castillo is a supervisor within the meaning of Section 2(11) of the Act. There is no showing that Castillo has authority to hire, discharge, or otherwise implement or effectively recommend any of the actions set out in Section 2(11) of the Act. Although Castillo has assigned overtime to employees twice in the absence of Chief Chemist Willie Gonzales, there was no showing that Castillo had authority to do so when Gonzales was present in the laboratory.

Since July 1983, when Castillo became assistant chief chemist, Gonzales has been absent from the laboratory on a 2-week vacation, two weekends, and for periods of 1 or 2 hours during the workday when he was pursuing personal business. It was during these periods of Gonzales' absence that Castillo gave directions to laboratory personnel and otherwise acted as chief chemist. Although employees sought advice from Castillo and considered him to be a "boss," there was no showing that Castillo was acting other than a more experienced operator giving assistance to less experienced operators. Finally, I find from Castillo's testimony that since his promo-

[3] I based my findings of fact regarding Oscar Castillo's status upon his testimony and that of Alfonso Lopez. Personnel Manager Manuel Galindo's testimony conflicted with Castillo's regarding the extent to which the latter performs physical testing and as to the extent of his authority when Chief Chemist Gonzales is present. I also noted that Galindo appeared reluctant to give a candid response to the General Counsel's questions regarding Castillo's physical testing As Castillo and Lopez reflected greater familiarity with the laboratory's operation than Galindo, and as they impressed me as being more candid witnesses, I have credited their testimony rather than Galindo's on this issue

tion he continues to spend most of his working time as a physical tester. Therefore, he continues to perform unit work for more than half of his working time. I find therefore that Castillo is not a supervisor within the meaning of the Act and that he continues to be an employee in the collective-bargaining unit. *Union 76 Auto Truck Plaza*, 267 NLRB 754, 755 (1983). Accordingly, I find no merit in the Company's defense against the allegation that about June 26, 1983, it unilaterally changed Oscar Castillo's classification from mix tester to assistant chief chemist in the laboratory department.

The Company urges dismissal of the two allegations regarding the assignment of Supervisor Enrique Zapata as a crane operator on the ground that these assignments were not substantial, material changes in the terms and conditions of employment of bargaining unit employees. In support of this contention, the Company points to the credited testimony of Personnel Manager Emanuel Galindo, that the Company has employed supervisors as crane operators "for at least 30 years." I also note that the Company and the Union have never executed any agreement covering the employment of supervisors as crane operators.

I find merit in the Company's contention. For where, as here, no contractual provision prohibits such an assignment and the record shows that supervisors have performed as crane operators previously, the assignment of Supervisor Enrique Zapata to operate a crane did not constitute a unilateral change. *Tufts Bros.*, 235 NLRB 808, 809 (1978). Accordingly, I shall recommend dismissal of those portions of the amended complaint which allege that Supervisor Zapata's assignment as a crane operator violated Section 8(a)(5) and (1) of the Act.

In light of the prior findings and conclusions in *San Antonio Portland Cement Co.*, 240 NLRB 1168 (1979), and those in Board Cases 23-CA-7182, et al. (JD-(SF)-155-80), 23-CA-8880 (JD-279-83), and 23-CA-9122 (JD-(ATL)-94-83), and the stipulated facts, I find that, except for the issues regarding Supervisor Enrique Zapata's assignments as a crane operator, the Company violated Section 8(a)(5) and (1) of the Act by its unilateral conduct and its failure to respond to the Union's request for negotiations and bargaining as set forth above.

In *San Antonio Portland Cement Co.*, id. at. 1170-1171, the International Union had requested the unit employees names, classification, rates of pay, dates of hire, and copies of their benefit programs. The Board held that the requested information was relevant and necessary and that the Company's refusal to furnish it to the International Union, as the recognized exclusive bargaining agent, violated Section 8(a)(5) and (1) of the Act. In light of the Board's holding, I find that the Company's refusal to furnish the Union's requested information in this case also violated Section 8(a)(5) and (1) of the Act.

C. *The Alleged Violation of Section 8(a)(3) and (1) of the Act*

Since 1978, the Company has maintained a list of 21 work rules which include rule 8 which prohibits employees from:

> Distributing literature or articles of any kind, including circulation of petitions. (Any advertising matter or propaganda or soliciting for any organization will not be permitted.)

Between August 22, 1980, and July 10, 1981, when the Union and the Company were engaged in collective-bargaining negotiations, the Company proposed a table of rules which included the following:

> 20. Solicitation for any cause during working time is prohibited.
>
> 21. Distribution of literature in working areas is prohibited.

The International Union refused to discuss the Company's proposed new work rules. Instead, the International Union agreed that the Company could continue to maintain the current work rules, which included rule 8 quoted above. In particular, I find from the testimony of Vice President Paul Balliet that the International Union specifically agreed that the Company could continue to maintain rule 8, the prohibition against distribution and solicitation.

In 1981 employee Julio Perez solicited employees' signatures during working hours at the Company in support of a petition to decertify the International Union. When employee Alfonso Lopez became aware of Perez' activity, he informed Personnel Manager Galindo, who said that he would investigate Lopez' allegations.

According to Lopez, the following day, Galindo reported that he had investigated the matter and Perez had denied engaging in solicitation. However, I find from credible testimony of Julio Perez, who appeared before me as a witness in Case 23-CA-8880, that Galindo found that Perez was engaging in solicitation. The record does not establish that Galindo learned that Perez was soliciting signatures during working hours on the Company's premises.

Mix Chemist Alfonso Lopez has been a company employee for approximately 25 years. Since 1978, the Company has been aware that Lopez has been and is a union activist. During negotiations in 1980 and 1981, he was a member of the Union's bargaining committee.

On September 3, 1983, the Company suspended Lopez for 30 days on the grounds that he harassed a contractor's supervisor, violated work rule 8 by soliciting employee Isabel Jose Herrera on July 18, 1983, at approximately 1:30 p.m. in the plant parking lot during Lopez' working hours, and that he had also violated work rule 15 by being away from his work station without excuse.[4]

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[4] Herrera's testimony corroborated the Company's version of the solicitation Lopez' version disagreed as to the time of the incident I credited Herrera.

Lopez testified that he solicited Herrera on behalf of the Union on July 18, 1983, before 7 a m , Lopez' starting time However, his responses to questions regarding where he was and what he was doing at 1 30 p m. that day, the time at which Herrera places the solicitation, were evasive Lopez testified that he was "probably running tests" and in response to a question about what he was doing at 1.30 p m on July 18, 1983, he answered in terms of his usual practice. In contrast, Herrera was responsive and appeared to be giving his best recollection with self-assurance. I therefore found Herrera to be the more reliable witness.

There was no showing that prior to Lopez' suspension, any member of the Company's management talked to him about his union activity or threatened him with discipline because of his union activity.

The complaint alleges that the Company violated Section 8(a)(1) of the Act by promulgating and maintaining rule 8. The complaint also alleges that the Company violated Section 8(a)(3) and (1) by suspending Alfonso Lopez because he violated rule 8 and because of his union activity. At the hearing, and in his posthearing brief, counsel for the General Counsel conceded that under the Board's decision in *Jefferson Chemical Co.*, 200 NLRB 992 (1972), I am barred from finding that the promulgation and maintenance of rule 8 constituted a violation of Section 8(a)(1) of the Act The Company and the General Counsel agree that under *Jefferson Chemical*, where as here, the promulgation of rule 8 was known or should have been known to the General Counsel through his investigation of earlier unfair labor practices, including the unfair labor practice charge which gave rise to the complaint in *San Antonio Portland Cement Co.*, supra, the General Counsel may not thereafter challenge that conduct in a subsequent complaint. *Jefferson Chemical Co.*, supra, id. at 994.

Assuming that the earlier cases did not afford the General Counsel the opportunity to learn of rule 8, a later case did. For in Case 23–CA–8880, both the International Union and the General Counsel became aware of the Company's existing work rules, including rule 8. Indeed, the parties have stipulated that in that proceeding, employee Julio Perez testified as to the enforcement of the no-distribution aspect of rule 8. Yet, it was not until the instant proceedings that the General Counsel contended that its promulgation and maintenance were unlawful. However, I can agree only with the Company's contention and the General Counsel's concession that the authority of *Jefferson Chemical Co.*, supra, precludes me from finding that the promulgation of rule 8 constituted an independent violation of Section 8(a)(1) of the Act. I also find that the 6-month limitation contained in Section 10(b) of the Act bars a finding that the promulgation of rule 8, in 1978, 5 years before the initial charge was filed in these cases, violated the Act. *Inland Shoe Mfg. Co.*, 211 NLRB 843 fn. 3 (1974).

I do not agree, however, that the holding of *Jefferson Chemical* applies to the maintenance of rule 8 or its enforcement within the 6-month limitation period. First, unlike the allegation barred under *Jefferson Chemical*, the maintenance of rule 8 is a continuing course of conduct which is occurring now, and its enforcement against Lopez in September 1983 could not have been litigated in the earlier proceedings involving the Company.

Further, were I to rule as the Company urges, I would do violence to the policy involved in Section 7 of the Act. For if I permitted the Company to maintain and enforce rule 8, which I hereafter find to be invalid under Board policy, I would be granting it a license to interfere with, restrain, and coerce its employees in the exercise of the right to engage in union activity which is protected by Section 7 of the Act.

Turning to rule 8, I find it to be unlawfully broad under the Board's policies as enunciated in *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962), and reaffirmed in *Our Way, Inc.*, 268 NLRB 394 (1983). Under that doctrine, the Board has held that a broad no-solicitation rule banning such activity during nonworking time is presumptively invalid. *Stoddard-Quirk Mfg.*, supra at 617. The Board has also recognized special business circumstances may permit a broad no-solicitation rule which includes nonworking time. Id. fn. 4, pp. 617–618. In the instant case, the Company has provided no evidence that its production and maintenance operation require the absolute ban on employee solicitation contained in rule 8.

The Board in *Stoddard-Quirk* also held that a rule prohibiting distribution of literature by employees in nonworking areas is presumptively invalid. Id. at 621. Here again the Company has not presented any evidence of special circumstances warranting this broad prohibition. Accordingly, I find that rule 8 is invalid.

I find no merit in the Company's contention that the Union waived Alfonso Lopez' Section 7 right to solicit support for the Union from other employees. For the Board has held that a union cannot effectively waive rights of employees to engage in concerted or union activity within the meaning of Section 7 of the Act. *Massey-Ferguson, Inc.*, 246 NLRB 1100, 1101 (1979).

Finally, the Company's contention that litigation of Lopez' suspension was barred under Section 10(b) of the Act is not supported by Board doctrine. For, the Board has recognized that while the promulgation of an invalid no-distribution, no-solicitation rule may be time-barred by Section 10(b) of the Act, the allegations that such rules have been enforced and maintained within the 6-month period prior to the charge are not barred by Section 10(b) of the Act. *American Cast Iron Pipe Co.*, 234 NLRB 1126 fn. 1 (1978).

I find that by maintaining rule 8, which prohibits employee solicitation during nonworktime and prohibits employee distribution of literature during nonworktime in nonwork areas, the Company is violating Section 8(a)(1) of the Act. *Duralee Fabrics*, 246 NLRB 677, 679, 680 (1979). I further find that by enforcing rule 8 against employee Alfonso Lopez, by suspending him for 30 days, the Company violated Section 8(a)(3) and (1) of the Act. *Duralee Fabrics*, id. at 679.[5]

CONCLUSIONS OF LAW

1. Respondent Alamo Cement Company (formerly known as San Antonio Portland Cement Company) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

[5] I find it unnecessary to consider whether the Company also violated Sec 8(a)(3) and (1) of the Act by disciplining Lopez because of his union activity. However, if the Board disagrees with my finding that the enforcement of rule 8 against Lopez was unlawful, I further find that the General Counsel has failed to show that union animus motivated the Company's conduct and would recommend dismissal of the pertinent complaint allegations

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truckdrivers and mechanics, but excluding all other employees, including office clerical employees, order clerks, guards, watchmen and supervisors as defined in the Act, employed at its San Antonio, Texas plant.

4. Since September 8, 1978, United Cement, Lime, Gypsum and Allied Workers International Union, AFL–CIO–CLC has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment.

5. By unilaterally without notice to, or consultation with, the Union, hiring a new employee as a temporary laborer at its Broadway operations, resuming operation of its crusher at its Broadway operations by utilizing Supervisors Sergio Zapata, Fred Contreras, and Sylvestre Ramirez to operate said equipment, changing the compensation of bulk loader-weighmasters from hourly pay to salary, changing the manner in which overtime was paid to mechanics at its 1604 operations so that regular time was eliminated and only straight time was used, changing Oscar Castillo's classification from mix chemist (doing physical testing) in the laboratory department to assistant chief chemist in the laboratory department, and implementing an across-the-board pay increase whereby employees received wage increases if their wage rates were at or below the wage rates for the classifications of said employees, Respondent has failed and refused to bargain collectively with the Union and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By refusing to meet with the Union for purposes of discussing and negotiating the aforesaid unilateral changes and modifications and their effects on bargaining unit employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By failing and refusing to furnish the Union with relevant and necessary bargaining information concerning employees in the above-described bargaining unit, including, but not limited to, the employees' names, addresses, telephone numbers, wage classifications, and seniority, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. By maintaining and enforcing rule 8, a no-distribution and no-solicitation rule which prohibits its employees from distributing or soliciting anywhere on the Company's premises, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. By suspending employee Alfonso Lopez for 30 days because he violated rule 8, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

11. Respondent has not otherwise engaged in conduct violative of the Act as alleged in the amended consolidated complaint.

THE REMEDY

Having found that Respondent has committed and is committing certain unfair labor practices, I shall recommend that it be ordered to cease and desist from such conduct and to take such affirmative actions as I find necessary to remedy the effects of the unfair labor practices and to effectuate the policies of the Act. Thus, I shall order that Respondent, upon the Union's request, cease utilizing its supervisors including Sergio Zapata, Fred Contreras, and Sylvestre Ramirez to operate the crusher at its Broadway operation. I shall also recommend that Respondent bargain with the Union upon request regarding the effect of the hiring of a new employee as a temporary laborer, about May 9, 1983, at Respondent's Broadway operations. Further, I shall order that Respondent, upon the Union's request, restore bulk loader-weighmaster classification from hourly paid to salaried status. I shall further recommend that upon the Union's request, Respondent restore the manner in which it paid overtime to the mechanics at its 1604 operation, by restoring the use of regular time instead of straight time. I shall also order that Respondent, at the Union's request, meet for the purpose of discussing and negotiating the unilateral changes and modification as found above in this decision and the effects of such changes and modifications on the bargaining unit employees. In addition, I shall order that Respondent furnish to the Union the names, addresses, phone numbers, wage classifications, and seniority of the employees in the bargaining unit.

Since it is possible that Respondent's violations of Section 8(a)(5) and (1) of the Act resulted in loss of earnings to the bargaining unit employees, they are entitled to compensation therefor, and effectuation of the policies of the Act requires it. Therefore, I will recommend that Respondent make whole any employee who lost wages as a consequence of the Respondent's unilateral conduct, to be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest to be determined in accordance with the policy set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Having found that Respondent unlawfully suspended employee Alfonso Lopez on September 3, 1983, for 30 days, I will require Respondent to make him whole for any loss of earnings and other benefits he may have suffered as a result of the unlawful suspension, such amount to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as comput-

ed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[6] Finally, I shall order Respondent to expunge from its records and files any reference to the 30-day suspension imposed on Alfonso Lopez on September 3, 1983, and inform him by letter that it has been done and that his unlawful suspension will not be used as a basis for future personnel action against him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Alamo Cement Company, San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, giving effect to, or enforcing any rule which prohibits employees from soliciting at any time on company property and prohibits distribution by employees in nonworking areas of the Company's property during their nonworking time.

(b) Suspending, discharging, or otherwise discriminating against employees because of their union sympathies or activities or because they selected the Union, United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL–CIO–CLC, or any other labor organization, as their collective-bargaining representative.

(c) Refusing to recognize and bargain collectively in good faith with United Cement Lime, Gypsum and Allied Workers International Union and its Local 560, AFL–CIO–CLC as the exclusive bargaining representative, concerning wages, hours, and conditions of employment of the employees in the following appropriate unit:

> All production and maintenance employees including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truckdrivers and mechanics, but excluding all other employees including office clerical employees, order clerks, guards, watchmen and supervisors as defined in the Act, employed by the Respondent at its San Antonio, Texas plant.

(d) Unilaterally, without notice to or consultation with the Union, hiring new temporary employees at its Broadway operation, utilizing supervisors to operate its crusher at its Broadway operation, changing the bulk loader-weighmasters from hourly paid to salaried status, changing the manner in which overtime is paid to mechanics at its 1604 operation so that regular time is eliminated and only straight time is used, changing the classifications of employees in the above unit, from one employee classification to another, implementing an across-the-board pay increase whereby unit employees receive wage increases if their wage rates were at or below the wage rates for the classification of said employees, or otherwise changing the rates of wages, hours, or other terms and conditions of employment of any bargaining unit employee, without first notifying the Union and providing it with an opportunity to bargain collectively with Respondent in good faith concerning such proposed changes; providing that nothing herein shall require Respondent to rescind any wage increases or promotions which it has previously granted to the unit employees.

(e) Refusing to meet and bargain collectively with the Union concerning the unilateral changes in the wages, hours, and conditions of employment of employees in the bargaining unit as found in this decision and regarding the effect of such changes on the bargaining unit employees.

(f) Refusing to furnish relevant and necessary bargaining information concerning employees in the above-described appropriate unit, including but not limited to the employees' names, addresses, telephone numbers, wage classifications, and seniority.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

(b) On request, furnish to the Union all relevant and necessary bargaining information concerning the employees in the aforesaid appropriate unit, including but not limited to the employees' names, addresses, phone numbers, wage classification, and seniority.

(c) Give notice to and bargain with the Union before implementing any future changes in the wages, hours, and working conditions of the unit employees in the above-described appropriate unit.

(d) Make restitution to the employees in the above-described appropriate unit, for any wages or other benefits which may have been lost by virtue of the Company's unilateral implementation of terms and conditions of employment, in the manner set forth in the portion of this decision entitled "The Remedy."

(e) On request of the Union rescind or bargain in good faith about each of the following unilateral changes and their effects:

(1) The hiring of a new temporary employee on or about May 19, 1983, as a laborer at its Broadway plant.

(2) The employment of supervisors Sergio Zapata, Fred Contreras, and Sylvestre Ramirez to operate the crusher at the Company's Broadway operation.

(3) The change of the bulk loader-weighmaster classification from hourly to salaried status.

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[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[7] If no exceptions are filed as provided by Sec 102 46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(4) The change in the manner in which overtime is paid to the mechanics at its 1604 operations so that regular time is eliminated and only straight time is used.

(f) Make whole Alfonso Lopez for any loss of pay he may have incurred by reason of the Company's discrimination against him, in the manner described above in the remedy section of this decision.

(g) Expunge from its employment records and files any entry concerning employee Alfonso Lopez' suspension of September 3, 1983, and present him with a letter telling him that this suspension is expunged from the record and will not be used as a basis for any future personnel action against him.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its Broadway and 1604 facilities copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the amended consolidated complaint be dismissed insofar as it alleges violations of the Act other than those found above.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."